Radtha d/o Raju & Ors v Dunlop Estates Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-04-53-1994
SHAIK DAUD, NH CHAN AND ABDUL MALEK JJCA
10 JANUARY 1996

Labour Law *— Employment — Termination of employment — Indemnity in lieu of notice — Change in ownership of business for purpose of which employee is employed — Notice of termination not given — Whether employee entitled to indemnity in lieu of notice — Whether fact of a change in ownership of business amounts to termination of employee's service — Employment Act 1955 s 12(3)(f) — Employment (Termination and Lay-off Benefits) Regulations 1980 reg 8*

The appellants were employed by Dunlop at its estate up to 31 August 1990. On 1 September 1990 the estate was sold to Industrial Oxygen Industries Bhd and Dynamic Plantations ('IOI-Dynamic'). On 4 September 1990 the appellants were given letters of offer of continued employment by IOI-Dynamic and on 7 September 1990 the appellants accepted the offer. The appellants claimed that Dunlop failed to issue notices of termination to them as required by s 12(3)(f) of the Employment Act 1955 ('the Act') and sought indemnity in lieu of notice pursuant to s 13 of the Act. The Assistant Director of Labour dismissed their claim on the grounds that reg 8 of the Employment (Termination and Lay-off Benefits) Regulations 1980 ('the Regulations') applied and there was no termination of service because the appellants had accepted the offer of continued employment by IOI-Dynamic. Furthermore, the appellants had not suffered any monetary loss. The High Court dismissed the appellants' appeal holding that as the appellants' contracts of service were not for specified periods they continued until they were terminated and that since there was no termination the question of indemnity in lieu of notice did not arise. The appellants appealed to the Court of Appeal.

Held, allowing the appeal:

(1) (Per **Abdul Malek JCA**) Section 12(3) of the Act clearly states that a change of ownership of the business for which an employee is employed amounts to a termination of service of that employee and that a notice of termination was mandatory. Thus, there was a termination of service of the appellants when Dunlop sold the estate to IOI-Dynamic and since no notice of termination had been given to the appellants, they were entitled to indemnity in lieu of notice (see p 567H–I).

(2) (Per **Shaik Daud JCA**) The object of s 12(3) is to safeguard an employee's position where a change has occurred in the ownership of the business or a part of the business for the purpose of which the employee was employed. Once there was a change in

ownership, a fact of termination of service of the employee exists and s 12(3)(f) operates to require the employer to give notice of termination of service. In the instant case, a fact of termination had occurred when Dunlop sold the estate to IOI-Dynamic and therefore s 12(3) applied and Dunlop was required to give notices of termination to the appellants with effect from 1 September 1990. The fact that there was a continuation of service and that there was no monetary loss were irrelevant for the purposes of interpreting s 12(3) — they were only relevant where the claim was for termination benefits under reg 8 of the Regulations, not indemnity in lieu of notice under s 13(1) of the Act as in the present case. The appellants were therefore entitled to indemnity in lieu of such notice (see pp 570D–571A).

(3) (Per **NH Chan JCA** dissenting) In the instant case, s 12(3) did not apply because there was no written notice of termination of service of the employee from the employer attributing the dismissal to the change in ownership of the estate under sub-s (3)(f). There was also no termination of the employee's employment by the employer without notice under s 13(1) as there was no payment made or tendered by the employer to the employee in lieu of notice in accordance with s 13. By reg 8(3) a transfer does not operate so as to terminate the contract of employment of an employee by the transferor (the employer) in the undertaking transferred. It provides for the continuation of the contract of employment, on the conditions in reg 8(3) being satisfied, with the transferee. The contract has effect after the transfer as if it was originally made between the person so employed and the transferee without the change of employer constituting a break in the continuity of his employment. In the instant case, the facts support the application of reg 8(3). Accordingly, the appellants would not be entitled to indemnity in lieu of notice. The appeal would therefore be dismissed (see pp 573D, 574G).

[Bahasa Malaysia summary

Perayu digaji oleh Dunlop di ladangnya sehingga 31 Ogos 1990. Pada 1 September 1990 ladang itu dijual kepada Industrial Oxygen Industries Bhd dan Dynamic Plantations ('IOI-Dynamic'). Pada 4 September 1990 perayu telah diberi surat tawaran untuk meneruskan penggajian mereka oleh IOI-Dynamic dan pada 7 September 1990 perayu telah menerima tawaran itu. Perayu menuntut bahawa Dunlop gagal mengeluarkan notis penamatan kepada mereka seperti yang dikehendaki oleh s 12(3)(f) Akta Pekerjaan 1955 ('Akta tersebut') lalu memohon tanggung rugi sebagai ganti notis mengikut s 13 Akta itu. Penolong Pengarah Buruh telah menolak tuntutan mereka atas alasan bahawa peraturan 8 Peraturan Pekerjaan (Faedah Penamatan dan Pemberhentian) 1980 ('the Employment (Termination and Lay-off Benefits) Regulations 1980') ('Peraturan itu') terpakai dan tidak terdapat penamatan perkhidmatan kerana perayu telah menerima

A tawaran untuk meneruskan penggajian oleh IOI-Dynamic. Lagipun, perayu tidak mengalami apa-apa kerugian kewangan. Mahkamah Tinggi menolak rayuan perayu, dan memutuskan bahawa oleh kerana kontrak perkhidmatan perayu bukanlah untuk tempoh yang spesifik, kontrak itu berterusan sehingga ia ditamatkan, dan bahawa memandangkan tidak terdapat penamatan soal tanggung rugi sebagai ganti notis tidak timbul. Perayu merayu kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan itu:

(1) (Oleh **Abdul Malek HMR**) Seksyen 12(3) Akta tersebut jelas menyatakan bahawa satu pertukaran pemunyaan perniagaan di mana seorang pekerja digaji samalah dengan satu penamatan perkhidmatan pekerja itu dan bahawa satu notis penamatan adalah mandatori. Maka, terdapat penamatan perkhidmatan perayu apabila Dunlop menjual ladang itu kepada IOI-Dynamic dan oleh kerana tiada notis penamatan diberikan kepada perayu, mereka berhak mendapatkan tanggung rugi sebagai ganti notis (lihat ms 567H–I).

(2) (Oleh **Shaik Daud HMR**) Tujuan s 12(3) adalah untuk menjaga kedudukan pekerja di mana satu pertukaran berlaku dalam pemunyaan perniagaan atau sebahagian perniagaan di mana pekerja itu digaji. Sebaik sahaja terdapat pertukaran pemunyaan, hakikat penamatan khidmat pekerja itu wujud dan s 12(3)(f) berfungsi untuk menghendaki majikan memberikan notis penamatan perkhidmatan. Di dalam kes ini, satu hakikat penamatan berlaku apabila Dunlop menjual ladang itu kepada IOI-Dynamic dan oleh itu s 12(3) terpakai dan Dunlop dikehendaki memberikan notis penamatan kepada perayu bermula daripada 1 September 1990. Hakikat bahawa terdapat penerusan perkhidmatan dan bahawa tidak terdapat kerugian kewangan tidaklah relevan bagi tujuan mentafsirkan s 12(3) — mereka cuma relevan di mana tuntutan dibuat untuk faedah penamatan di bawah peraturan 8 Peraturan itu, dan bukan tanggung rugi sebagai ganti notis di bawah s 13(1) Akta tersebut seperti dalam kes ini. Oleh itu perayu berhak mendapat tanggung rugi sebagai ganti notis sedemikian (lihat ms 570D–571A).

(3) (Oleh **NH Chan HMR** menentang) Di dalam kes ini, s 12(3) tidak terpakai kerana tidak terdapat notis bertulis penamatan perkhidmatan pekerja daripada majikan yang memberikan sebab penamatan itu sebagai pertukaran pemunyaan ladang itu di bawah subseksyen (3)(f). Juga tidak terdapat penamatan penggajian pekerja oleh majikan tanpa notis di bawah s 13(1) kerana tidak terdapat bayaran yang dibuat atau diberikan oleh majikan kepada pekerja sebagai ganti notis mengikut s 13. Mengikut peraturan 8(3) satu pemindahan tidak berfungsi untuk menamatkan kontrak penggajian seseorang pekerja oleh pihak yang membuat pemindahan perniagaan tersebut (majikan itu). Ia memperuntukkan penerusan kontrak penggajian, atas syarat

bahawa peraturan 8(3) dipenuhi, dengan penerima pemindahan. Kontrak itu mempunyai kesan selepas pemindahan itu seakan-akan ia dibuat antara orang yang digaji dengan penerima pemindahan pada asalnya tanpa pertukaran majikan yang menjejaskan kesinambungan penggajiannya. Dalam kes ini, perayu tidak berhak mendapatkan tanggung rugi sebagai ganti notis. Oleh itu rayuan ini patut ditolak (lihat ms 531D, 574G).]

Notes

For cases on termination of employment, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 790–835.

Cases referred to

Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014
Premier Motors (Medway) Ltd v Total Oil Great Britain Ltd & Ors [1984] 1 WLR 377

Legislation referred to

Evidence Act 1950 s101
Employment Act 1995 ss 11(2), 12(1), (2), (3), (4), 13(1), 69
Employment (Termination and Lay-Off Benefits) Regulations 1980 regs 4(4), 8(1), (2), (3)

Appeal from: Civil Appeal No 16–3–92 (High Court, Muar)

B Lobo (*Lobo & Associates*) for the appellants.
N Sivabalah (*Shearn Delamore & Co*) for the respondent.

Cur Adv Vult

10 January 1996

Abdul Malek JCA: The agreed facts in this case are as follows:

(a) Up to 31 August 1990, the appellants had been employed by the respondent, Dunlop Estates Bhd ('Dunlop').

(b) On 1 September 1990, there was a change of ownership of the estate.

(c) On 4 September 1990, the appellants had been given letters of offer of continued employment by Industrial Oxygen Industries Bhd and Dynamic Plantations Bhd ('IOI-Dynamic').

(d) All the appellants had accepted the offer on 7 September 1990.

(e) Dunlop did not issue any letter terminating the contract of service of the appellants or any notice of termination of service to them.

The whole appeal, to my mind, rests upon the interpretation of s 12 of the Employment Act 1955 ('the Act') in particular sub-ss (3)(f) and (4) and, in consequence, s 13 as well. For ease of reference, the relevant sections read:

12(3) Notwithstanding anything contained in subsection (2), where the termination of service of the employee is attributable wholly or mainly to the fact that —

...

(f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue ofa sale or other disposition or by operation of law,

the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsection (2)(a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.

(4) Such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.

13(1) Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with section 12, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.

(2) Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

Dunlop did not give any notice of termination to the appellants when the new owners took over and the Assistant Director of Labour in Segamat on 19 September 1991 had dismissed the appellants' claim for indemnity amounting to RM231,490.16 in lieu of notice under s 69 of the Act. The Assistant Director of Labour was of the opinion that reg 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations') applied and there was no termination of the contract of service of the appellants by the respondent because the appellants had accepted the offer for continued employment with the new owners and that there was never any break in the continuity of the period of employment.

It is relevant to reproduce at this juncture reg 8 of the Regulations:

(1) Where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under these Regulations, if within seven days of the change of ownership, the person by whom the business is to be taken over immediately after the change occurs, offers to continue to employ the employee under terms and conditions of employment not less favourable than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer.

(2) If the person by whom the business is to be taken over immediately after the change occurs does not offer to continue to employ the employee in accordance with paragraph (1), the contract of service of the employee shall be deemed to have been terminated, and consequently, the person by whom the employee was employed immediately before the change in ownership occurs and the person by whom the business is taken over immediately after the change occurs shall be jointly and severally liable for the payment of all termination benefits payable under these Regulations.

(3) Where an offer by the person by whom the business is taken over immediately after the change occurs to continue to employ the employee is accepted by such employee the period of employment of the employee under the person by whom the employee was employed immediately before the change occurs, shall, for the purposes of these Regulations, be deemed to be a period of employment under the person by whom the business is taken over, and the change of employer shall not constitute a break in the continuity of the period of his employment.

Learned counsel for the appellants had argued in the court below that the contract of service of the appellants with the respondent had been terminated on 31 August 1990 and it was only four days later, namely 4 September 1990, that the new owners had sent the letters of offer. As such, they were entitled to the indemnity in lieu of notice. He had added that the termination benefits under the Regulations were not applicable.

Learned counsel for Dunlop had at that stage submitted that the argument that there had been termination and that consequently, the indemnity in lieu of notice was payable was misconceived. This was because, he had went on to say, that it was never the intention of Dunlop to terminate the services of the appellants and their employment continued until they voluntarily accepted the offer made by the new owners. The offer was on terms and conditions which were not less favourable than those of their previous contract and they had accepted the offer without any interruption of their employment. They had not, therefore, suffered any financial loss.

He had further stated that in the service contract between the appellants and Dunlop, there was no specified period and accordingly s 11(2) of the Act applied. The subsection reads:

> A contract of service for an unspecified period of time shall continue in force until terminated in accordance with this Part.

The learned trial judge was of the considered view that the burden was on the appellants to prove that their services had been terminated based on s 101 of the Evidence Act 1950. In this case, he said, there was no evidence that Dunlop had terminated the services of the appellants in line with s 12(1) of the Act which states:

> Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.

What had taken place, he added, was only the change of the ownership of the estate. On the question of the indemnity in lieu of notice, he was of the opinion that it was only applicable where financial loss had occurred.

A For purpose of completeness, it is pertinent to state the provisions of s 12(2) of the Act as well:

> The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in
B writing, shall not be less than —
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> (a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given;
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> (b) six weeks' notice if he has been so employed for two years or more but less than five years on such date;
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C (c) eight weeks' notice if he has been so employed for five years or more on such date:
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> Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.

D My considered view is that both s 12 of the Act and reg 8 of the Regulations are relevant. Going first to the Regulations, based on the facts of the case, it is clear that where there is a change in the ownership of a business, the appellants would not be entitled to any termination benefits if within seven days of that change of ownership, the new owners offer to continue to employ the appellants under terms and conditions of employment not less
E favourable than those under which the appellants were employed, namely with Dunlop, and the appellants unreasonably refused the offer. Here, the appellants had accepted the offer and it follows that reg 8(1) of the Regulations cannot apply to the present facts.

Neither can reg 8(2) of the Regulations as that provision is only
F applicable where the new owners did not make the offer under reg 8(1) of the Regulations in which case both Dunlop and IOI-Dynamic would be jointly and severally liable for the payment of all termination benefits. For our purpose, only reg 8(3) of the Regulations applies to the facts of this case because the appellants had accepted the offer made by IOI-Dynamic and their period of employment under Dunlop is deemed to be a period of
G employment under IOI-Dynamic and the change of employer shall not constitute a break in the continuity of the period of their employment.

But, then, we are not concerned with the aspect of termination benefits in the circumstances enumerated in reg 8 of the Regulations. We
H are only concerned with the issue as to whether the fact of a change of ownership of the business amounts to a termination. In this regard, s 12(3) is abundantly clear in statutorily declaring that it does and that a notice of termination is nothing less than mandatory. This is strengthened by the fact that the parties had agreed in their agreed statement of facts that there
I was in fact a change of ownership of the estate on 1 September 1990. Further, since no notice of termination had been given for this occurrence, indemnity in lieu of notice is due to the appellants. It does not matter that seven days after the event, the appellants had in fact accepted the offer made by the new owners.

The appellants are, therefore, entitled to the indemnity of RM231,490.16 in lieu of the notice of termination necessitated by the change of ownership of their business under s 12(3)(f) of the Act. The appeal is allowed with costs here and in the court below and the deposit is to be refunded to the appellants.

10 January 1996

Shaik Daud JCA: This is an appeal from the decision of the High Court, Kuala Lumpur whereby on 21 September 1994 the court dismissed the appeal of the appellants against the decision of the Labour Court. The facts of the case are not in dispute.

All the appellants who were members of the Estate Workers Union were originally employed by Dunlop Estates Bhd ('Dunlop') at their rubber estate known as Segamat, Gombali and Paya Lang ('the estate') up to 31 August 1990. On 1 September 1990 the estate was sold to Industrial Oxygen Industries Bhd and Dynamic Plantations Bhd ('IOI-Dynamic').

The appellants contend that on 4 September 1990 IOI-Dynamic, the new owner of the estate, made offers of employment to all appellants in the same estate on terms that should they accept the offers, their services would be continued. All the appellants accepted the offers on 7 September 1990 and thereafter their services continued uninterrupted with IOI-Dynamic.

The appellants contend that Dunlop failed to give them notices of termination of their employment with Dunlop as required by s 12(3)(f) of the Employment Act 1955 ('the Act'). Their claim against Dunlop is for a total sum of RM231,490.16 as indemnity in lieu of notices as a result of the sale of the estate to IOI-Dynamic, as provided by s 13 of the Act. Hence they filed their claim under s 69 of the Act before the Labour Court. Their claim was heard by the Penolong Pengarah Buruh (the Assistant Director of Labour) who dismissed their claim on the following grounds:

1. There was no termination of service.
2. The complainants had received offers of continued employment by the new employer.
3. The complainants were paid same wages in their respective capacity, on the same terms and conditions which were not different from their previous employment.
4. The complainants suffered no monetary loss. The court held that Dunlop therefore need not pay any indemnity in lieu of notices and accordingly rejected their claims.

On appeal to the High Court their appeal was dismissed and the decision of the Labour Court was confirmed. The High Court held that as the contract of service is not for a specific period it continues until it is terminated. The court agreed that as there was no termination the question of indemnity in lieu of notice does not arise. Hence this appeal.

Learned counsel for the appellants, Mr Lobo, submitted that the High Court was wrong in law when it held that there was no termination of employment. He refers to the agreed facts as recorded by the High Court. He submits that the first two items of the agreed facts clearly established the fact of termination. It was agreed by the parties both in the Labour Court and in the High Court:

(a) that all the appellants were employed by Dunlop up to 31 August 1990; and

(b) that on 1 September 1990 there was a change of ownership of the estate.

He contends that by these two agreed facts alone, there is in evidence the fact of termination. He contends that even though there was no interruption of employment, as a result of the change of ownership, there must be a fact of termination of employment with the old employer and a beginning with the new employer and once this fact exists, then the provisions of s 12(3)(f) of the Act become operative. Therefore the appellants shall be entitled to, and the employer shall give to the employee, notice of termination of service. He contends that the old employer cannot escape his statutory duty under the Act by simply terminating, as an employer changing ownership is required by law to give notice of termination or pay indemnity in lieu thereof under s 13(1) of the Act.

Learned counsel for Dunlop however submits that there is no principle of law that when a change of ownership occurs there is automatic termination of employment. He contends that the employment of all the appellants continued independently up to 6 September 1990, and they were all employed by Dunlop. By virtue of reg 8(1) and (3) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 (a regulation made under s 102 of the Act), the moment the employee accepts the offer of continued employment, his period of employment would go back to the date of the change of ownership with the new employer, ie in this case it would be from 1 September 1990. Hence it is contended that there is no termination.

Now s 12(3)(f) of the Act provides:

> Notwithstanding anything contained in subsection (2), where the termination of service of the employee is attributable wholly or mainly to the fact that —
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> ...
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> (f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,
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> the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsection (2)(a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.

The calculation for the amount of the indemnity is provided for by s 13(1) of the Act. A

It is my view that the object of this subsection is to protect the employee in case of change of ownership of a particular business or part of that business. It is to provide security in his employment. If no notice is required to be given then I feel that his position as employee will be neither here nor there. There ought to be a termination under one employer and if necessary the beginning of one under the new employer. Otherwise as in the present case if anything were to happen to an employee say on 3 September 1990 it is debatable under whose employment would be considered. Secondly I would think that such a notice would be necessary in order to give the employee an alternative as he may not wish to be employed by the new employer. Therefore it is my view that the subsection is to safeguard the employee's position. B C

The crucial issue to be determined in the circumstances of the present case is whether there is a termination of service of the appellants when Dunlop sold the estate to IOI-Dynamic. In the light of the clear admission that the appellants ceased to be employed by Dunlop after 31 August 1990, I for my part would agree with the submission by learned counsel for the appellants that a fact of termination had occurred and once this happens, the provisions of s 12(3)(f) must be operative and Dunlop is duty bound by law to issue notice of termination with effect from 1 September 1990. It is my view that both the Labour Court and the High Court went estray when they were harbouring the issue of continuation of service and that there was no monetary loss. These two issues, to my mind, are irrelevant for the purpose of interpreting s 12(3)(f) of the Act. Both courts while accepting the agreed facts appear to give no effect to them. It would be of no use for parties to agree on certain facts when courts give no effect to them. The issue of reg 8 of the Regulations too has no relevance as the claim is not one for termination benefits under the Regulations but one under the provisions of the Act for an indemnity in lieu of notice. Only the provisions of the Act ought to be considered and this provision is to my mind clear. Once there is a fact or evidence of change of ownership, and more so in this case in view of the clear admission by Dunlop, a fact of termination exists and Dunlop has no alternative but to comply with the clear provisions of s 12(3)(f) of the Act, by giving notice of termination to the appellants. The fact that new offers of employee is given by the new employer makes no difference. When they agreed that the services of the appellants were up to 31 August 1990, Dunlop has thereby admitted that the relationship between the appellants and Dunlop had been severed on 31 August 1990. As such a fact of termination has occurred. It would be superfluous to have provisions such as in s 12(3)(f) of the Act where the former employer can circumvent it by merely saying that as the employee had been taken over by the new employer, there is no termination. D E F G H I

After giving careful consideration on the matter I am of the view that it is encumbent upon the old employer to give notice of termination to the employee when there occurs a change of ownership of the business or part of the business of the employer, and as far as s 12(3)(f) of the Act is

A concerned it is irrelevant whether the employee is offered continuous employment with the new employer. The question of continuous employment only becomes relevant where the employee is seeking termination benefit under the Regulations.

For the above reasons, I for my part agree with the submissions of
B learned counsel for the appellants that once there is an act of termination established, as in this case, ipso facto s 12(3)(f) of the Act becomes operative. Therefore I would allow this appeal with costs here and below, and consequently direct that Dunlop do pay the appellants the amount claimed, ie RM231,490.16 as indemnity in lieu of notice.

C *10 January 1996*

NH Chan JCA (dissenting): At common law a contract of employment may be terminated at any time either by the employer or by the employee. If it is terminated by the employer, it is determined by dismissal and if it is by the employee, the employment is determined by resignation. Dismissal
D at common law may be either lawful of wrongful.

Section 12(1) of the Employment Act 1995 provides for the termination of a contract of employment at any time either by the employer or by the employee giving notice in writing (see s 12(4)) to determine the employment. The subsections read:

E (1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.

...

(4) Such notice shall be written and may be given at any time, and the day on which the notice is given shall be included in the period of the notice.

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The length of notice to be given is the same for both employer and employee and will depend on the written terms for such notice in the contract of employment. In the absence of such provision in writing, the length of the notice of termination must not be less than the statutory minimum provided for in sub-s (2) of s 12 of the Act. It reads:

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> The length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in the terms of the contract of service, or, in the absence of such provision in writing, shall not be less than —
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> (a) four weeks' notice if the employee has been so employed for less
> H than two years on the date on which the notice is given;
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> (b) six weeks' notice if he has been so employed for two years or more but less than five years on such date;
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> (c) eight weeks' notice if he has been so employed for five years or more on such date:
>
> I Provided that this section shall not be taken to prevent either party from waiving his right to a notice under this subsection.

See also 16 *Halsbury's Laws of England* (4th Ed, reissue 1992) para 288 which states the position at common law. It says:

> **Notice at common law.** In the absence of an express stipulation or customary arrangement as to notice, a contract of employment is terminable at common law by reasonable notice. The question as to what is a reasonable period of notice is one of fact, depending on all the circumstances of the case and the nature of the employment, and an implied term of reasonable notice may be greater than the statutory minimum applicable to all employees.

But, in this country, unless there is an express provision in writing as to the length of the notice, the statutory minimum as specified in s 12(2) will apply. However, in the absence of any express stipulation as to the length of the notice, a contract of employment is determinable at common law by a reasonable period of notice which may be greater (but must be not less) than the statutory minimum applicable under s 12(2).

Under s 13(1) a contract of employment may also be terminated without notice by either the employer or the employee paying an indemnity in lieu of notice (of a sum equal to the amount of wages which would have accrued for the term of the notice) to the other party. The subsection reads as follows:

> Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with section 12, without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice.

An employer may also terminate the employment of an employee by giving notice which is to be in writing (see s 12(4)) for any of the reasons stated in s 12(3), in which case, the length of such notice must not be less than the statutory minimum specified in sub-s (2). Section 12(3) is as follows:

> Notwithstanding anything contained in subsection (2), where the termination of service of the employee is attributable wholly or mainly to the fact that —
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> (a) the employer has ceased, or intends to cease to carry on the business for the purposes of which the employee was employed;
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> (b) the employer has ceased or intends to cease to carry on the business in the place at which the employee was contracted to work;
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> (c) the requirements of that business for the employee to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish;
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> (d) the requirements of that business for the employee to carry out work of a particular kind in the place at which he was contracted to work have ceased or diminished or are expected to cease or diminish;
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> (e) the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer; or
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> (f) a change has occurred in the ownership of the business for the purpose of which an employee is employed or of a part of such

> business, regardless of whether the change occurs by virtue of a sale or other disposition or by operation of law,
>
> the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under subsection (2)(a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.

So that where the dismissal of the employee is attributable to any of the circumstances mentioned in sub-s (3), then the employee is entitled to, and the employer must give to the employee, notice of termination of the employee's contract of employment. Such notice is to be in writing (sub-s (4)).

In the instant case, s 12(3) does not apply because there was no written notice of termination of service of the employee from the employer attributing the dismissal (in the instant case) to the change in ownership of the estate under sub-s (3)(f). In the instant case, there was also no termination of the employee's employment by the employer without notice under s 13(1) as there was no payment made or tendered by the employer to the employee in lieu of notice in accordance with the section.

If an employer did not avail himself of the provision of s 12(3), then, what is the effect on the contractual relationship between master and servant when there was a change in the ownership of the undertaking in which the servant was employed? At common law, 'if an employer, A, transferred his business to another, B, the employee's contract of employment with A undoubtedly came to an end': see *Premier Motors (Medway) Ltd v Total Oil Great Britain Ltd & Ors* [1984] 1 WLR 377 at p 380 per Browne-Wilkinson J. This is because at common law (see *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at pp 1018–1019 per Viscount Simon LC):

> ... a contractual right to personal service was a personal right of the employer and was incapable of being transferred by him to anyone else, and that a duty to serve a specific master could not be part of the property or rights of that master capable of becoming, by transfer, a duty to serve someone else. It is, of course, indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent ... The rule is so strict that if the contract is between individuals on both sides and X dies, the contract of service immediately dissolved — *Farrow v Wilson* (1869) LR 4 CP 744, 746 — for A never promised to serve X's personal representative and X could only act as employer when alive. Where a firm consisting of four partners engaged the plaintiff as manager for a term of two years, the retirement of two partners from the firm within that period operated as a wrongful dismissal of the plaintiff: *Brace v Calder* [1895] 2 QB 253. If A's contract is to serve a limited company, X & Co, and X & Co goes into liquidation, the winding-up order operates as a notice of discharge to the servants of the company: *Chapman's case* (1866) LR 1 Eq 346.

There is, however, statutory provision contrary to the position at common law and this is found in reg 8(3) of the Employment (Termination and Lay-Off Benefits) Regulations 1980. Regulation 8 reads as follows:

> (1) Where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under these Regulations, if within seven days of the change of ownership, the person by whom the business is to be taken over immediately after the change occurs, offers to continue to employ the employee under terms and conditions of employment not less favourable than those under which the employee was employed before the change occurs and the employee unreasonably refuses the offer.
>
> (2) If the person by whom the business is to be taken over immediately after the change occurs does not offer to continue to employ the employee in accordance with paragraph (1), the contract of service of the employee shall be deemed to have been terminated, and consequently, the person by whom the employee was employed immediately before the change in ownership occurs and the person by whom the business is taken over immediately after the change occurs shall be jointly and severally liable for the payment of all termination benefits payable under these Regulations.
>
> (3) Where an offer by the person by whom the business is taken over immediately after the change occurs to continue to employ the employee is accepted by such employee the period of employment of the employee under the person by whom the employee was employed immediately before the change occurs, shall, for the purposes of these Regulations, be deemed to be a period of employment under the person by whom the business is taken over, and the change of employer shall not constitute a break in the continuity of the period of his employment.

By reg 8(3) a transfer does not operate so as to terminate the contract of employment of an employee by the transferor (employer) in the undertaking transferred but instead provides for the continuation of the contract of employment, on the conditions in reg 8(3) being satisfied, with the transferee. At common law such contract of employment would have been terminated by the transfer but now that contract has effect after the transfer as if it was originally made between the person so employed and the transferee without the change of employer constituting a break in the continuity of his employment.

Unless reg 8(1) or reg 8(3) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 applies, the employee is entitled to termination benefits payable under the Regulations (see reg 8(2)) as 'the contract of service of the employee shall be deemed to have been terminated'. However, under reg 4(4):

> An employee shall not be entitled to any termination benefits payment where he leaves the service of his employer before the expiration of any

notice given to him by his employer in accordance with section 12 of the Act —

(a) without the prior consent of the employer, which consent shall not be unreasonably withheld; or

(b) without having made payment to the employer in accordance with section 13.

In the instant case, the facts support the application of reg 8(3). I would dismiss the appeal.

Appeal allowed with costs here and below.

Reported by Choo Siew Ling